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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 684

JAMES ANTHONY ALLEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

~~MOTION FOR LEAVE TO FILE~~ PETITION FOR A WRIT OF CERTIORARI AND PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE PETITION FOR A A WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States

Petitioner herein, James Anthony Allen, a resident of the State of Washington, moves the court for leave to file the petition hereto annexed for a Writ of Certiorari pursuant to 28 U. S. C. Section 1254 (1) and Rules 37(b) and 45 (a) of the Federal Rules of Criminal Procedure to review the judgment entered in this case on January 4, 1951, and further moves the court to grant judgment in accordance with the petitioner's

prayer and to grant such other relief as may be just in the premises.

Dated April 14, 1951.

JAMES ANTHONY ALLEN, *Petitioner.*

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI AND REASONS AND ARGUMENT IN SUPPORT THEREOF

Petition

James Anthony Allen prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit directing a reversal of that certain order and judgment entered by the said Court of January 4, 1951, which affirmed the verdict of a jury and the judgment of a District Court in said cause and likewise directing the nullification of that certain order entered by said Court of Appeals on February 19, 1951, denying the Petition of your petitioner in said court for a re-hearing.

Opinion Below

The opinion of the Court of Appeals for the Ninth Circuit in this cause is reported in 9th Cir., 186 Fed. (2d) 439. (See R. 1359-1373.)

Jurisdiction

The judgment of the Court of Appeals was entered on January 4, 1951 (R. 1374) and re-hearing denied February 19, 1951 (R. 1375). The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254(1) and Rules 37(b) and 45(a) of the Federal Rules of Criminal Procedure.

Principal Questions Passed On by the Court of Appeals for the Ninth Circuit

1. The Court of Appeals held that even though there might be inconsistency in the verdict which found petitioner Allen not guilty of six substantive counts, and guilty of the seventh count of conspiracy, such inconsistency was no ground for reversal.

2. The Court of Appeals held that although the prosecution of petitioner Allen was based on seven counts of an indictment, which counts included six charges of substantive crime, and one charge of conspiracy, that there was no mis-use of the conspiracy statute.

3. The Court of Appeals held that receipt of testimony on behalf of the Government to prove petition-

er's complicity in a conspiracy after the date of December 26, 1946, which petitioner alleges was evidence of a separate and independent conspiracy apart from the conspiracy charge in Count VII was properly received because the government had not undertaken to prove its case by acts done or declarations made out of court by co-defendant Keane, a government witness, at a time subsequent to the date mentioned, and further that such evidence was properly received to round out the picture of what finally happened to the stock of certain companies involved.

STATUTES INVOLVED

The statutes involved in this action are as follows:

Title 18 U. S. C. A., Sec. 338, Using Mails to Defraud; Title 15 U. S. C. A., Sec. 77(q), Fraud in Sale of Securities; Title 18 U. S. C. A., Sec. 88, Conspiracy.

STATEMENT OF CASE

This action was a criminal action by the United States as plaintiff against James Anthony Allen, Francis Clayton Keane and Joseph Valentine Grismer, as defendants, based on an indictment of the Grand Jury returned May 6, 1948 (R. 2-13) charging in seven counts, use of the mails to defraud, fraud in the sale of securities and conspiracy. Counts I, II and III of the indictment charged violation of the statute prohibiting the use of the mails to promote fraud; Counts IV, V, and VI charged violation of Title 15 U. S. C. A., Section 77q; fraudulent sale of securi-

ties by mail; and Count VII charges violation of the criminal code, Section 37, Title 18 U. S. C. A. Section 88, conspiring to commit offenses against the United States in violating said Title 18 U. S. C. A., Section 338 said Title 15 U. S. C. A., Section 77q and Title 15 U. S. C. A., Section 77e using mails when no registration statement in effect. The statutes covered by the indictment are set out verbatim in the appendix.

The jurisdiction of the District Court existed under Judicial Code, Section 24, amended, Subdivision (2), Title 28 U. S. C. A., Section 41, Subdivision (2), in force at time of filing of indictment.

Allen pleaded not guilty to all counts of indictment (R. 67), was tried before a jury, and found not guilty on all of the substantive counts of the indictment, being Counts I to VI, inclusive, and guilty on the conspiracy count, Count VII (R. 88).

Keane organized Extension in June, 1945, and Pilot in January, 1946. Grismer became president of the Extension and Keane its attorney. Keane became president of Pilot and his stenographer its vice president. The properties of these companies were acquired from Grismer. Public offerings of stock of Extension netted $178,000 and of Pilot $100,000. Of these moneys Extension expended on mine development $65,000 and Pilot $10,000. Grismer was mine manager for both companies. All records of these companies were kept in Keane's office which issued all stock. Keane han-

dled all funds and issued all checks (Respondent's Exs. 68, 69, 81; Petitioner's Exs. C, T, U; R. 179-186, 219-226, 384, 387, 395, 615, 631-632, 641).

Keane, as president of the Independence Lead Mines Company, hereinafter referred to as Independence, had absolute control of its assets, including stock in Clayton Silver Mines. Independence advanced to Montana Leasing Company, hereinafter referred to as Montana Leasing, during 1943 to 1945, inclusive, about $125,000. Keane sold through his personal account in private transactions 218,000 shares of Clayton stock for about $112,000 and accountant on Keane's statements charged this to Montana Leasing (R. 241, 224, 673-674, Petitioner's Ex. L).

Keane caused Montana Leasing, with properties in Montana, to be organized and became its president. Its successor, Lexington Silver-Lead Mines, Inc., was organized by Keane in 1945. Independence and Delaware Mines Corporation agreed to and did invest capital in development of the Montana properties, for which these companies received production notes and substantial stock interests. Allen had charge of its mining operations only (Petitioner's Ex. G. H; R. 681-684, 1029, 1056, 1108-1113).

The important testimony in this case concerns the conversion of the money (Black, R. 906). The court termed Keane "the evil Mr. Keane"; that Keane was

"confessedly evil," and referred to "those evil acts of Mr. Keane" (R. 929, 930, 931).

There is also testimony that Keane forged Allen's name to a promissory note from Montana Leasing to Independence for $60,000 dated October 14, 1944 (Petitioner's Ex. M; Respondent's Ex. 95) which Allen first saw in March, 1947, with no names on it (Allen R. 1075-1076) and that Keane forged Allen's name to a check dated December 3, 1945, of J. A. Hogle & Company, Butte, payable to Allen for $6872.95 (Respondent's Ex. 105; R. 824), representing the sale of Extension stock through his name, which Allen never delivered to said firm and which check he never received nor saw until it was introduced at the trial (Allen R. 1076-1078, 1092). Allen never at any time authorized Keane or Mrs. Vermillion to sign his name on notes or checks (R. 1090-1091).

When petitioner's counsel was testing Keane's memory on cross-examination on the Independence audit, the following occurred:

"Q. Is there any reason, Mr. Keane, that you have no recollection of any of these things?

A. Yes.

Q. What is it?

A. Intoxication.

Q. During what period of time?

A. Oh, from shortly after Mr. Allen and I were

very active together, I drank very heavily, up until the fall of '47.

Q. Until the fall of '47?

A. That is correct; very heavily. I was practically a common drunkard."

Allen testified on cross-examination that in spite of Keane's drinking he did not have any real suspicion at the time to question the manner in which Keane was handling the bank accounts (R. 1114).

And Keane's wife testified that when Allen called at their home in the fall of 1946, Keane was "stone sober" and had not had a drink for over two months (R. 1176-1179).

In June, 1947, and prior to the return of the indictment, this defendant lawyer had commenced an action against Allen, Grismer and others in the State Court at Wallace, Idaho (Keane, R. 7381), about which Keane made a public announcement in the newspaper that he had "borrowed" all the money in question (Allen, R. 1148) which he in this trial admitted that he had embezzled.

In order for the government to prove the gist of the crime of conspiracy, to-wit: an agreement among conspirators to commit an act in violation of the federal statutes and a corrupt intent and wrongful purpose, Keane was the key witness for the government and he testified that Allen proposed that they incorporate the Extension ground, make some money out

of the promotion of the Extension, if they could, and bail themselves out (R. 611-612).

The government contended through the testimony of Keane that a partnership existed between Keane and Allen; that on October 5, 1943, they commenced operating as a partnership under the firm name of Montana Leasing Company, and that they were equally interested in Keane's share of the stocks he received from the attorneys and vendors of Extension and Pilot and his promotion stock in Pilot (Keane, R. 610, 614, 622-623, 630, 659-660, 701-703, 707), and through Keane's testimony a 1943 federal income tax return of Keane and Allen as a partnership, prepared by Randall, was admitted in evidence (Respondent's Ex. 93) solely for the purpose of showing Keane was contending in 1944 there was a partnership between the two of them, although Allen did not sign it, nor did Keane mail a copy to him (Keane, R. 739, 762-766).

Allen denied that any such partnership ever existed. In March, 1947, Allen approved the terms of Petitioner's Ex. M, $60,000 production note dated October 14, 1944, of Montana Leasing to Independence and would have executed it if it was the instrument of the corporation, and stated that Montana Leasing Company was never a partnership (R. 1075-1076, 1152).

Allen explained there was no necessity from the records for bailing out as Keane had stated (R. 1066-1067, 1078).

During 1945 Allen wrote his personal checks totaling $4500.00 for Montana Leasing and they were deposited through Keane's office to Montana Leasing (Petitioner's Ex. X; R. 1068) and another thousand the bank record will show, but he has not been able to find the slip (R. 1069). During 1946 he gave his personal checks to Montana Leasing or its successor, Lexington Silver-Lead, totaling $70,000 (Petitioner's Ex. Y), plus two checks, one dated August 17, 1946, for $3,000 and one dated November 19, 1946, for $2,000 shown on bank statement, but he cannot find the checks, a total of $75,000 (R. 1070). During 1947 he gave personal checks to Lexington Silver-Lead on his personal funds amounting to $76,000 (Petitioner's Ex. Z, R. 1071) and in 1948 personal checks amounting to $27,500 (Petitioner's Ex. AA; R. 1071). These payments from Allen's personal funds totaled $184,000.

The court instructed the jury that Allen had the legal right to sell any stock in Pilot or Extension owned by him upon the following conditions:

(1) That such sale occured after the expiration of one year after the date of the first offering of such corporation's stock for sale through an underwriter, or

(2) Upon broker's transactions executed upon customer's order on any exchange or in the open or counter market, but not on the solicitation of such orders; and further, that this right of Allen to legally

sell any such stock would only extend to such stock as he was selling independent of any criminal scheme or conspiracy to violate the mail fraud law or the Securities Act (R. 1219).

The government contended that Allen was an active participant in the affairs of Extension and Pilot, but was concealing his interest. Because of the representations made to him by Keane and Grismer that Keane was going to run and look after the Pilot, Johnston, an attorney, stated in the Pilot prospectus that the company was promoted by Keane and its activities to date were completely controlled and dominated by him and the work that Allen was doing and the advice he was giving to Grismer did not change his opinion as to whom was dominating the company. Grismer told the SEC officials Allen was not a promoter of the companies (R. 426).

Allen was drawn into this matter by association and interests in other properties which necessarily concerned Pilot and Extension. He testified as to the properties that could be developed by putting them all into a central development, because of the vein systems that traverse them and to avoid questions that might arise as to extra lateral rights through separate development by various companies, and that such development be done through the Gold Hunter Mine which had two or three miles of underground workings with shaft from the tunnel to the 1200-foot level, a 600-ton mill, a production record of about twenty mil-

lion dollars, and was located on the highway and railroad (R. 1032-1033, 1050). He commenced active negotiations with the Gold Hunter in February, 1945, and discussed it with the owners of mining properties in that vicinity (R. 1034-1035). The veins on Pilot dipped south and at depth would be found in other properties (R. 1036). He went to Chicago in the summer of 1945 and met the attorney for the owners of the Gold Hunter who was also an officer of the company (R. 1047) and made a continuing offer of $250,000 for the property based on its physical value and went back to Chicago for said purpose in 1946 and in December, 1947, but without success (R. 1048-1051). He has since been negotiating with Day Mines, one of the largest mining companies in the Coeur d'Alenes (R. 1104-1105).

Allen did not have occasion to question Keane's integrity or his manner of handling the bank accounts (Allen, R. 1059, 1113); he trusted Keane implicitly because of the men Keane was dealing with (R. 1121, 1168, and so did Grismer, who testified:

> "Well, people say, 'Why in heck did you trust him?' I will tell you why. He was attorney for the Independence; he was president of the Independence Lead; he was attorney for the Clayton. They trusted him; why in hell shouldn't I? That is my answer, and I say, unfortunately" (R. 453).

and attorney Johnston had confidence in Keane (R. 595).

Grismer testified that the work on the Pilot ceased in December, 1946, because the bills were not being paid as the company had run out of money. He had quite a few discussions with Keane, as he was handling the money, but he never could get from him any explanations; it was always a run-around. Grismer advised and talked with Allen, and Allen seemed to be at a loss as to why the bills were not paid (Grismer, R. 407, 452, 453, 454, 456, 1084-1085). The resignations of Keane, Vermillion and Evans as officers and directors of Pilot were secured February 21, 1948 (Petitioner's Exs. Q, R and S; Allen, R. 1083-1084), but they never secured bank ledger, checks, etc. (R. 1085). Grismer had called on Allen and between Allen and Wayne the resignations were secured (Grismer, R. 456; Petitioner's Ex. C). At the meeting of February 21, 1947, neither Keane nor Irene Vermillion made any claim of a partnership agreement between Allen and Keane (Allen, R. 1086).

In June, 1947, Allen requested of O. L. Jones, manager of the bank, the right to examine the bank account of Montana Leasing, but was refused permission because there was no written authority by the company to Allen (Allen, R. 1059-1060).

Keane testified that the incidents which terminated his relations with Allen and Grismer were, first, when Allen called at his house late in November or early in December, 1946, after he (Keane) had run out of money of the Pilot, and quarreled with him (R. 1169-

1170, 661-662); secondly, on December 26, 1946, when Silver-Lead, by action of its board of directors in adopting a resolution to the bank stating who could draw checks; and thirdly, at the time when Joe Grismer, Mullen and Evans entered his office after it was closed and removed some of the Extension books from his office—"that absolutely severed our last relation" (Keane, R. 730-731).

Reasons for Granting the Writ and Argument in Support Thereof

I.

This court should not, by adopting a strict and inflexible doctrine of stare decisis, give its approval to this verdict, where the verdict of acquittal on six substantive counts was not guilty and on one count of conspiracy guilty. The verdict was patently repugnant and inconsistent and was positively aided and abetted by a misuse of the conspiracy statute where the prosecution for substantive offenses was completely adequate.

Prior to the decision of the Supreme Court of the United States in *Dunn v. United States*, 284 U. S. 390; 52 S. Ct. 189; 76 L. Ed. 356; 80 A. L. R. 171, on certiorari from the 9th Cir. 50 F. (2d) 779, the Courts of Appeal for the Third, Eighth and Ninth Circuits had held that a conviction could not stand which was inconsistent, and unless the verdict of guilty was supported by substantial evidence other than that evidence which was offered in support of acts on which the acquittal had been had. The majority opinion in the State Courts likewise adhered to the same rule adopted by the Courts of Appeal set out above.

On the other hand the Courts of Appeal for the Second, Fifth, Sixth and Seventh Circuits had held previous to the decision in the Dunn case, *Supra,* that a verdict of guilty on one count would stand although inconsistent with a verdict of guilty on other counts. The majority of the State Courts still hold to the doctrine that a conviction cannot stand which is inconsistent. *State v. O'Neil* (1946) 24 Wash. (2d) 802; 167 Pac. (2d) 471.

There has likewise been voiced increasing disapproval of the tactics of prosecutors in employing the conspiracy statute where substantive prosecution would be and is wholly sufficient. See *Krulewitch v. United States,* 336 U. S. 440; 93 L. Ed. 790.

In view of the above we deem it in the public interest to request certiorari in this action to review a case in which petitioner stands convicted as the result of an inconsistent verdict, and where appellant stands convicted likewise because a conspiracy count was levelled as a shot-gun accusation in connection with six substantive counts in the same indictment, upon which six counts petitioner was acquitted.

(A)

Stare decisis has been defined as follows:

> "That a deliberate or solemn decision of a court or judge made after argument on a question of law fairly arising in a case and necessary to its determination is an authority or binding prece-

> dent in the same court or in other courts of equal or lower rank in subsequent cases where 'the very point' is again in controversy; but that the degree of authority belonging to such a precedent depends of necessity on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law; and that the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual rather than arbitrary or inflexible." (Daniel H. Chamberlain THE DOCTRINE OF STARE DECISIS, New York, Baker-Voorhis & Co. [1885].)

This statement summarizes generally the American doctrine and it appears that the courts of the United States have never accepted the inflexible original doctrine held by the English courts (Gray, JUDICIAL PRECEDENTS [1895], 9 *Harvard Law Review* 27; *Wash. Law Rev.* Vol. 21 No. 3, July 1946).

Mr. Justice Lurton in *Hertz v. Woodman,* 218 U. S. 205, 212; 54 L. Ed. 1001, 1910) stated as follows:

> "The rule of stare decisis, although one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court which is again called upon to consider a question once decided."

Mr. Justice Jackson stated in *U. S. v. Southeastern Underwriters Assn.,* 332 U. S. 533; 88 L. Ed. 1340, that

> "Judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical, and, in part, on policy considerations."

Judge Cardozo, in commenting upon *Johnston v. Cadillac Motor Co.*, 261 Fed. 878 (1919), stated as follows:

> "The conclusion of the majority of the court, whether right or wrong, is interesting as evidence of a spirit and tendency to subordinate precedent to justice. How to reconcile that tendency, which is a growing and in the main a wholesome one, with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day. We shall have to feel our way here as elsewhere in the law. Somewhere between worship of the past and exaltation of the present, the path of safety will be found" (Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS, Yale Univ. Press [1942], 149).

We do not suggest general abandonment of precedent without compelling reason, but we do suggest that where circumstances present themselves of a nature that cry for remedy or clarification the Court should give response and appraisal to them. This is particularly so, where conviction results in inconsistency and upon a conspiracy count, though acquittal was had on six counts of substantive offense. The court should weigh the questions on both sides and determine if dissatisfaction with the former rule is great, and the court should then determine that if there is such dissatisfaction which is proper and just, that new applicable rules should be employed. In this case the court should weigh two evils—the inconsistent verdict, and the use of a conspiracy count which spawned the inconsistent verdict.

(B)

The court told the jury as to what were the essential elements of the scheme to defraud or conspiracy, as alleged in the first paragraph of Count I of the indictment and re-alleged by reference in every other of the six remaining counts (R. 1234-1235, 1237), so, eliminating for the stake of brevity the non-essential elements of the crimes charged to defendants, the indictment alleged in every count in substance that defendants Allen, Keane and Grismer knowingly, wilfully and intentionally devised, joined, or participated in a scheme to defraud purchasers or prospective purchasers of stock of Extension and Pilot and to obtain money and property by means of false and fraudulent pretenses, representations, and promises for the purpose of doing these essential elements of the scheme to defraud:

(1) By concealing the fact that Allen was a promoter of said companies and was to receive any part of the stock to be taken by defendants.

(2) By representing to investors in stock of said companies that the proceeds from the sale of said stock would be used by said companies for the exploration and development of their mining properties in Shoshone County, Idaho, well knowing that such proceeds were not to be so used and that a portion of the moneys due said corporations from the sale of their treasury stock would be appropriated and diverted from said

companies to their own use and benefit and that it was so appropriated and diverted;

(3) By intending and agreeing that certain stock in said companies would be given to attorneys as attorneys' fees, but that actually a part of it would and did come back to the defendants as promoters for the purpose of defrauding the public (R. 2, 1234-1235, 1237).

The first three counts of mail fraud alleged in effect that defendants, for the purpose of executing said scheme, did knowingly cause to be delivered by United States mail a certain letter (R. 5).

Likewise, as to Counts IV, V and VI, it was alleged that defendants caused to be delivered by United States mail certain letters, all of which acts were against the peace and dignity of the United States and contrary to the form of the statute (R. 7-10).

In Count VII it was alleged in substance that defendants conspired, combined, confederated and agreed with each other and with divers other persons unknown to the grand jury to commit the following crimes and offenses against the United States; violations of mail fraud statute and two sections of the National Securities Act, by using the United States mails and means and instruments of transportation and communication in interstate commerce, for the purpose of executing the device, scheme and artifice to defraud described in paragraph 1 of the first count

of the indictment, which paragraph is here and now re-alleged.

That the government intended and contended that the same scheme was jointly intended and executed by all of the defendants, including Allen, is indicated by the statement of the district attorney to the court, when the jury asked their questions hereinbefore referred to, that the court should instruct the jury that the scheme is set forth in Count I in detail, and define what that scheme is again in as short and concise language as possible and then state that the *other counts incorporate that same scheme by reference* and that the various other respective counts *charge that the same scheme was used as Count I,* to mail letters on the other dates mentioned in the *other respective counts* (R. 1266; and see Juror, R. 1264-1265; Court, R. 1208-1209, 1269-1277).

The jury held by its verdict on the substantive offenses charged, that the petitioner Allen did not singly, or jointly and in concert with the other two defendants, commit any of the crimes charged in Counts I, II, III, IV, V and VI. Likewise, the verdict of the jury has the effect, as to Counts I to VI, inclusive, of holding that Allen was not singly, or jointly and in concert with the other two defendants, guilty of committing any of the so-called false and fraudulent pretenses, representations and promises, or of participating in such scheme, and it is pertinent to observe that in

pleading the false and fraudulent pretenses, representations and promises the government pleaded the entire structure of its case as to each and every count in the indictment including Count VII. It seems absolutely clear that the lengthy and detailed pleading of the acts alleged to have been committed, in view of the government's theory, was intended by the government to encompass all of the direct and circumstantial proof upon which the government relied to prove each count in the indictment herein. Likewise, it is most pertinent to note that the indictment alleges as to the alleged commission of crimes that "prior to June 1, 1945, and continuing to the date of this indictment," etc. In other words, the government supports Count VII upon precisely the same alleged evidence, the same circumstances, the same allegations, covering the same time that it bases its allegations of *joint scheming and defrauding, etc.,* which it sets up in the substantive counts of the indictment.

The jury found that the essential elements upon which the government depended, and for which it contended, and which it pleaded in Counts I to VI were not proved, and any contrary finding in Count VII concerning the self-same necessary elements of proof and covering the self-same time involved is not only inconsistent but necessarily repugnant. This conviction, if allowed to stand, is abhorrent to the right of the petitioner to receive a fair trial, and fair treatment consistent with the principles of our system of

justice. As Justice Jackson, in the *Krulewitch* case, *supra*, said:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

Justice Butler, in his dissent in the *Dunn* case, *supra*, considered in a very scholarly opinion the matter of inconsistent verdicts and his reconciliation of the problem, and stated that in criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction, citing

> 2 *Bishop*, New Criminal Procedure, 2d Ed. Sec. 1015a(5)

and concluded as follows:

> "I am of opinion that the authorities established as well-settled: (1) that when, upon an indictment charging the same offense in different counts, the jury acquits as to one and convicts on the other, defendant is entitled to new trial; and (2) that, when different crimes are charged in separate counts and the jury acquits as to one and convicts on the other, the conviction will be sustained unless, excluding the facts which the

jury in reaching its verdict of acquittal necessarily found not proved, it must be held as a matter of law that there is not sufficient evidence to warrant the verdict of guilty; and, where the evidence outside the facts so conclusively negatived by the acquittal on one count is not sufficient to sustain guilt on the other count, defendant is entitled to a new trial."

To hold as consistent and not repugnant a verdict of acquittal on all substantive counts of indictment as against conviction on conspiracy count on the same and identical evidence on which defendant was acquitted where the elements of the alleged scheme to defraud were the same as the elements of the alleged conspiracy is neither common sense nor rational.

Justice Jackson in the *Krulewitch* case, *supra,* said that statutes authorize prosecution for substantive crimes without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges; that there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offenses is adequate; and that the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.

Justice Jackson cites in footnote 2 from the Conference of Senior Circuit Judges presided over by Chief Justice Taft in 1925 as follows:

"* * * the rules of evidence in conspiracy cases

make them most difficult to try without prejudice to an innocent defendant."

The Justice observes that the basic conspiracy principle has some place in modern criminal law, because, to unite back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer, and

> "It also may be trivialized, as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade * * * and it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law."

In the case at bar an administrative branch of the government, commonly called the SEC, was prosecuting in the name of the United States only three defendants on the theory that they had joined in a scheme to defraud in violation of the mail fraud statute and the National Securities Act and had, in addition, conspired to violate those statutes—a case of covering over charges of the commission of specific crimes with an "elastic, sprawling and pervasive offense" of conspiracy to commit the specific crimes, which required an extremely low minimum of proof to establish, permitted the loose application of rules of evidence and created an especially difficult situation for the petitioner.

The court has itself considered this problem in *Von*

Moltke v. Gillies (1948), 332 U. S. 708; 68 S. Ct. 316; 92 L. Ed. 309. The separate opinion of Mr. Justice Frankfurter, concurred in by Mr. Justice Jackson, contains this striking comment on criminal conspiracy:

> "But it would be very rare, indeed, even for an extremely intelligent layman to have the understanding necessary to decide what course was best calculated to serve her interests when charged with participation in a conspiracy. The too easy abuses to which a charge of conspiracy may be put have occasioned weighty animadversion by the Conference of Senior Circuit Judges. * * * The subtleties of refined distinctions to which a charge of conspiracy may give rise are reflected in this Court's decisions. See e.g., *Kooteakos v. United States*, 328 U. S. 750; 66 S. Ct. 1239; 90 L. Ed. 1557. Because of its complexity, the law of criminal conspiracy, as it has unfolded, is more difficult of comprehension by the laity than that which defines other types of crimes. Thus, as may have been true of petitioner, an accused might be found in the net of a conspiracy by reason of the relation of her acts to acts of others, the significance of which she may not have appreciated and which may result from the application of criteria more delicate than those which determine guilt as to the usual substantive offenses."

Likewise, Justice Jackson, in the *Krulewitch* case, referred to an article in 62 Harvard Law Review, December 1948, page 276, which is likewise of great interest in its discussion of conspiracy. It is entitled, *"The Conspiracy Dilemma Prosecution of Group Crime or Protection of Individual Defendants."* The article itself is a noteworthy discussion of the con-

spiracy weapon: it quotes the use of the conspiracy statute, and refers to its description by Judge Learned Hand in *Harrison v. United States* (1925) 2d Cir., 7 F. 2d 259, 263, as the "darling of the modern prosecutor's nursery."

The *Krulewitch* case, *supra,* to which reference has been made, contains in a concurring opinion of Justices Jackson, Frankfurter and Murphy a very able discussion of the law of conspiracy as it relates to the matters now before this Court. It is truly a situation described by Justice Jackson when he said:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate."

Likewise, it should be remembered that, "a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime." *Terry v. United States* (1925), 9th Cir., 7 F. 2d 28, 30.

II.

The court should not allow a conviction to stand where evidence of an independent and separate conspiracy apart from that charged and attempted to be proved in the indictment was admitted by the court. Such procedure is plainly a misuse of the conspiracy statute.

The conspiracy as charged between Keane, Allen and Grismer terminated December 26, 1946, and did not continue after that date. There were two separate conspiracies, if any at all.

Count VII charged a conspiracy between Allen, Keane and Grismer beginning at some time prior to June 1, 1945, and continuing to date of indictment (R. 2, 10). A similar charge was made as to the same three defendants in an alleged scheme to defraud set forth in each of the other counts. No allegation is made that there was ever any conspiracy existing between two separate defendants beginning at any particular time.

Grismer testified on cross-examination that he had made the statements contained in his impromptu speech to the stockholders of Pilot at their meeting on August 7, 1948, advising them of the severance of all relations by him and Allen with Keane the latter part of December, 1946, and that it was a truthful statement (R. 461), and that the allegations in his affidavit sworn to February 15, 1949 (Petitioner's Ex. C), as to his actions in ousting Keane from Extension and Pilot and in having Keane arrested were true.

Following Grismer's testimony, objection was made

by petitioner Allen and overruled by the court, as to the introduction of Respondent's Ex. 48 during the testimony of Nolting, being checks of E. J. Gibson & Co., to cash and B. A. McLean (French) January 20 to September 26, 1947, on the ground that on the uncontroverted evidence of Grismer the exhibit could not prove any count in the indictment beginning January 20, 1947, and no concert of action alleged between Allen and Grismer. Later, after Keane testified, and Respondent's Ex. 48 as re-offered and re-admitted on Keane's re-direct examination, petitioner's objection was then that Keane had testified there was no agreement between him and Allen (if there ever was one, which Allen denies) after the fall of 1946, and based further upon the testimony of Keane and Grismer that no conspiracy could then exist, so far as defendant Grismer was concerned, and further, that the transaction was an exempt one made over a year after the original offering and not claimed to be treasury stock (R. 493-495, 769-771).

After Keane also testified that he severed all relations with Allen and Grismer (*Supra,* P. 14, 15), can it be said that the acts of Allen and Grismer in ousting Keane from Extension and Pilot, in having audits made of their records, and upon discovery of Keane's defalcations and that the treasuries of these companies were empty, taking over these companies and trying to keep them going, were acts in furtherance of an

alleged continuing conspiracy between Keane, Allen and Grismer? We believe not.

That the result of a conspiracy is continuing does not make the conspiracy a continuing one. To make a continuing conspiracy, there must be a continuity of action to produce the unlawful result. *Fiswick v. United States* (1946), 329 U. S. 211; 67 S. Ct. 224; 91 L. Ed. 196.

Continuous cooperation of the conspirators to keep it up is necessary. *United States v. Kissell* (1910), 218 U. S. 607; 31 S. Ct. 124; 54 L. Ed. 1178.

Then there is the question as to whether or not the state of facts adduced by the evidence created two separate conspiracies.

Judge Learned Hand, in the case of *United States v. Liss* (1943), 2d Cir., 137 F. 2d 995, at 998, in considering an indictment charging as a single conspiracy two separate conspiracies, which were separate both as to personnel and content, resulting in a variance between allegation and proof, said:

> "* * * and while it is not fatal of itself * * * it is not necessarily harmless. The question is like that of joining separate crimes in separate counts of a single indictment, or of consolidating separate indictments for trial; the propriety of either depends upon the danger they create that the jury may confuse the issues; * * * the fusing of the two conspiracies into one was therefore more serious against Liss and Conte—the only two of the accused who were confederates common to both

> conspiracies—than to Rudy or to the druggists. There was therefore a not wholly imaginary danger that the jury might use the evidence against them cumulatively to prove both charges."

The court concluded that if the conspiracies had been separated into two counts or two indictments it would have been proper to try Liss and Conte upon both charges at the same time.

Under the facts in the case at bar, there were two independent, separate, disconnected, and distinct conspiracies, if any at all, and the failure of the court to recognize this condition of the proof and to rule on the evidence and instruct the jury accordingly affected the substantial rights of petitioner Allen throughout the trial of this action, and on the motions made after the trial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX

Mail Fraud Statute

The pertinent portion of Title 18 U. S. C. A., Section 338, is as follows:

Sec. 338 (Criminal Code, section 215.) Using Mails to Promote Frauds; * * * Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

National Securities Act

Title 15, U. S. C. A., Section 77e, is as follows:

Sec. 77e. Prohibitions Relating to Interstate Commerce and the Mails.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this subchapter, unless such prospectus meets the requirements of section 77j; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for

the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 77j.

Title 15, U. S. C. A., Section 77q, is as follows:

Sec. 77q. Fraudulent Interstate Transactions.

(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, de-

scribes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c shall not apply to the provisions of this section.

Conspiracy Statute

Title 18, U. S. C. A., Section 88, is as follows:

Sec. 88. (Criminal Code, section 37.) Conspiring to Commit Offense Against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

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